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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 19 2007

SRC 06 193 50356

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

S Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is in the construction business. It seeks to employ the beneficiary permanently in the United States as an estimator pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that the beneficiary had the required degree.

On appeal, counsel asserts that the director failed to consider evidence submitted on two occasions. For the reasons discussed below, we find that the director properly denied the petition for lack of the required initial evidence and that the evidence submitted for the first time on appeal, required by the regulation and expressly requested in the director's request for additional evidence, cannot be considered at this stage. This decision, however, is without prejudice to any future petition the petitioner may file.[1]

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate degree or a foreign equivalent degree.

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[1] The petitioner filed another petition in behalf of the beneficiary on November 27, 2006, receipt number SRC-07-037-51575. The director approved this petition on January 10, 2007.

The regulation at 8 C.F.R. § 204.5(k)(3)(i) provides that in order to show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

Citizenship and Immigration Services (CIS) has the authority to make preference classification decisions. *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Moreover, CIS also has the authority to determine whether the alien is qualified for the job offered. *Id.*; *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *K.R.K. Irvine, Inc. v. Landon,* 699 F.2d 1006, 1008 (9th Cir. 1983).

Initially, the petitioner submitted the ETA Form 9089 indicating that the job requires a baccalaureate degree in civil engineering. The petitioner also indicated that it would accept a foreign equivalent degree. In Part J of the same form, the petitioner indicated that the beneficiary has a baccalaureate degree. While the beneficiary signed this form, the mere attestation of a credential on the ETA Form 9089 is insufficient. *See* 8 C.F.R. § 204.5(k)(3)(i)(B)(listing an official academic record as initial required evidence); 8 C.F.R. § 103.2(b)(2)(the unavailability or non-existence of required evidence creates a presumption of ineligibility); *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972)).

On Jun 27, 2006, the director issued a request for additional evidence stating:

> Submit an official academic record showing that the alien has a U.S. advanced degree or a foreign equivalent degree OR
>
> An official academic record showing that the alien ahs a U.S. baccalaureate degree or a foreign equivalent degree plus evidence showing that the alien has at least 5 years of progressive post-baccalaureate experience in the specialty.

In response, the petitioner submitted evidence demonstrating that the job requirements listed on the ETA Form 9089 were normal for the occupation. The petitioner did not, however, submit the evidence requested, the beneficiary's official academic record.

The director acknowledged the evidence submitted but concluded that the petitioner had not established that the beneficiary had the necessary degree.

On appeal, counsel acknowledges that the director requested evidence that the beneficiary has the required degree and notes that, in response, "a very detailed letter was sent explaining this position

and the requirements for the same." Counsel notes that the director quoted from this letter but professes confusion as to why the director then denied the petition "when all the information, including that of the degree and the additional five years of experience was submitted with this application not once but TWICE." Counsel further notes that the beneficiary listed this education on the ETA Form 9089.

Counsel's factual assertions are not supported by the record. The initial submission did not include the beneficiary's diploma or official academic record. Moreover, this evidence was not submitted in response to the director's request for additional evidence as claimed. Similarly, the record did not contain the employment letters prior to appeal. As stated above, merely claiming this education and experience on the ETA Form 9089 is insufficient. Further, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The record before the director did not contain an official academic record for the beneficiary. Such evidence is required initial evidence pursuant to 8 C.F.R. § 204.5(k)(3)(i) to establish that the beneficiary qualifies for the requested preference visa classification and that the beneficiary meets the job requirements on the alien employment certification. For this reason, the petition could not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.